



2011-037

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

February 15, 2011

301 WASHINGTON AVENUE
P.O. BOX 300182
MONTGOMERY, AL 36130-0182
(205) 245-7300
WWW.AGSTATEAL.US

Honorable James E. Turnbach
Attorney, Etowah County Board of Education
Turnbach, Warren, Roberts & Lloyd, P.C.
Post Office Box 129
Gadsden, Alabama 35902

BEFORE RELYING ON THIS OPINION,
SEE AMENDMENT TO CODE SECTION
41-16-60 (EFF. 6/9/2011) AND CODE
SECTION 16-13B-10 (EFF. 8/1/2009).

Education, Boards of - Contracts -
Competitive Bid Law - Conflicts of
Interest

A member of the Etowah County Board of Education ("Board") who is the principal owner of a telephone service firm should not submit a bid and contract for any and all aspects of a telephone products project or projects for the Etowah County Board of Education.

A corporate entity that is principally owned by a member of the Etowah County Board of Education should not submit a bid to a general contractor for a telephone services/products subcontract because the member of the Board has a beneficial interest in the contract to be awarded by the Board and should not vote to award such a bid.

Section 41-16-60 of the Code of Alabama prohibits a person who is the principal owner of a company from continuing to provide services under an existing contract to a county board of education once that person becomes a member of that board.

Dear Mr. Turnbach:

This opinion of the Attorney General is issued in response to your request on behalf of the Etowah County Board of Education.

QUESTION

(1) Can a board member who owns a telephone service firm submit a bid for any and all aspects of a telephone products project or projects for the Etowah County Board of Education if the Board has need for such services in the future?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that the Etowah County Board of Education has a newly elected board member, effective with the November 2010 general election. This new board member is the principal owner of TeleSystems, a telephone service provider that has an existing service contract with the board of education. This contract is dated May 11, 2010; has a one-year term; and predated the board member's service by almost six months. It is not anticipated that the terms of the contract will change prior to the expiration of the contract.

Section 41-16-60 of the Code of Alabama is a portion of what is commonly known as the Competitive Bid Law. This section prohibits a member of a county board of education from being financially interested or having any personal beneficial interest, either directly or indirectly, in a contract with the board on which that person serves. That section states, in pertinent part, as follows:

No member or officer of the said state trade schools, state junior colleges, state colleges and universities under the supervision and control of the State Board of Education, the city and county boards of education, the district boards of education of independent school districts, the county commissions and the governing bodies of the municipalities of the state and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions, shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service, nor shall any person willfully make any purchase or award any contract in violation of the provisions of this article.

This Office has previously determined that a board member is considered to be financially interested if the business that is to contract with the board is owned solely by the board member and/or his or her spouse, the member owns a majority of stock in the corporation, or the corporation is a family-held corporation. Opinion to Honorable John Hollis Jackson, Jr., Attorney, Chilton County Board of Education, dated March 30, 1989, A.G. No. 89-00227; opinion to Honorable Frank Daniel, Superintendent of Education, Chilton County Board of Education, dated February 23, 1989, A.G. No. 89-00195; opinion to Honorable Lewis S. Hamilton, Attorney for Butler County Board of Education, dated April 7, 1988, A.G. No. 88-00245. The benefits prohibited by state law are not limited to only those that are financial. Opinion to Honorable William H. Filmore, Attorney, Ozark City Board of Education, dated June 11, 1999, A.G. No. 99-00226.

Your request states that the board member is the principal owner of the telephone service provider. Thus, it is the opinion of this Office, based on the facts presented, that the board member has a financial interest in a potential contract and should not submit a bid and contract with the Board.

CONCLUSION

A member of the Etowah County Board of Education who is the principal owner of a telephone service firm should not submit a bid and contract for any and all aspects of a telephone products project or projects for the Etowah County Board of Education.

QUESTIONS

(2) May the board member's corporate entity submit a bid to a general contractor for a telephone services/products subcontract if a general contractor is bidding on a construction project for the board of education?

(3) When the Etowah County Board of Education votes to approve the lowest responsible bidder for a project, can the board member, who owns the contracting business, vote to approve a bid submitted by the general contractor if the board member's contracting firm bid the telephone work for the general contractor?

FACTS AND ANALYSIS

Your inquiry also questions whether this board member may participate in the bidding process as a subcontractor and then, as a member of the board, vote on the final approval of a particular general contractor. In essence, your inquiry seeks guidance regarding whether a more tangential or indirect relation with regard to contracts between the Board and this board member's company would be acceptable under the current laws of this state.

Section 41-16-60, however, prohibits a board member from having any personal beneficial interest, either directly or indirectly, in a contract with the Board. The Supreme Court of Alabama, in reference to section 41-16-60, noted that "[t]he intent of the legislature was to prevent a conflict of interest so that no member of a governing body would endeavor to give favorable treatment to businesses in which he would be financially or beneficially interested in connection with the purchase of personal property or a contractual service." *City of Montgomery v. Brendle Fire Equip., Inc.*, 291 Ala. 216, 222, 279 So. 2d 480, 486 (1973). That court went on to state the following:

[Section 46-16-60 of the Code] was intended to prohibit successful bidding by a member of a governing board of an instrumentality of a municipality and by business entities in which he has an interest, if such member will have a financial or beneficial interest, either directly or indirectly, in the award contract where such member will be or can be involved in the decision-making procedure as to who will receive the award contract.

Id.

As noted in Question 1, a board member who is the principal owner of a company may not submit a bid to the board on which he or she serves because that board member would have a financial interest in the award of such contract. The removal of a direct contractual relationship does not remove the financial or beneficial interest of the board member.

If the corporate entity is principally owned by a member of the Etowah County Board of Education, and it subcontracts a bid to a general contractor who is awarded a contract with the board of education, it is the opinion of this Office that the board member has, at least, an indirect interest in the contract with the Board. Accordingly, the board member's company may not subcontract a bid to a general contractor for a contract to be awarded by the Board or vote on the awarding of such a contract. See opinion to Honorable H.A. Lloyd, Attorney for Demopolis City Board of Education, dated August 23, 1991, A.G. No. 91-00358 (stating that a member of the city board of education would be in

Honorable James E. Turnbach
Page 5

violation of section 41-16-60 if his company entered into a contract to furnish goods and services to a general contractor in the event that the contractor is the successful bidder in a construction contract with the school board).

CONCLUSION

A corporate entity that is principally owned by a member of the Etowah County Board of Education should not submit a bid to a general contractor for a telephone services/products subcontract because the member of the Board has a beneficial interest in the contract to be awarded by the Board and should not vote to award such a bid.

QUESTION

(4) Because the Board entered into an executory contract, which is not anticipated to change prior to its expiration, is there any problem associated with the board member continuing to provide service under the existing contract based solely on the terms and conditions set out within that contract with no modification thereof?

FACTS AND ANALYSIS

In your inquiry, you state that the contract between the Etowah County Board of Education and TeleSystems is an executory contract, i.e., a contract in which you anticipate that the terms of the agreement will remain stagnant or fixed prior to the expiration of the agreement. Based on the type of contract and the fact that the contract was executed approximately six months prior to the board member taking office, you seek clarification regarding whether the existing contract may continue despite the fact the principal owner of TeleSystems is now a member of the board of education.

As noted earlier, section 41-16-60 of the Code prevents a member of the board of education from having a financial or beneficial interest in a contract with the board of education for which that person serves. Your final question is similar to the inquiry raised by Honorable William H. Filmore, Attorney, Ozark City Board of Education, dated June 11, 1999, A.G. No. 99-00226. In *Filmore*, the proposed appointment to the Ozark City Board of Education was an insurance agent who was a stockholder in a local insurance company that currently wrote the insurance coverage for the Ozark City Board of Education. This Office was asked whether the insurance agent or his company could continue to provide insurance coverage to the board of education.

Honorable James E. Turnbach

Page 6

In response, this Office stated that state law precludes a member of a board of education from having a beneficial interest, financially or otherwise, in a contract for the provision of services to the board of education. Accordingly, it is the opinion of this Office that state law forbids a member of the Etowah County Board of Education who is the principal owner of a private company from maintaining a contract with the board on which the board member serves.

This Office does not issue opinions interpreting the Ethics Law, which is found in sections 36-25-1 to 36-25-30 of the Code of Alabama. Therefore, we recommend that you also seek an opinion on these issues from the Ethics Commission.

CONCLUSION

Section 41-16-60 of the Code of Alabama prohibits a person who is the principal owner of a company from continuing to provide services under an existing contract to a county board of education once that person becomes a member of that board.

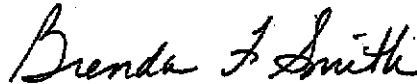
I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:



BRENDA F. SMITH

Chief, Opinions Division

LS/MMG

1082297/147471